LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
APR 6 1971
E. ROBERT SEAVER, CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1550

BEATRICE SILK, Petitioner

V.

THOMAS S. KLEPPE, ADMINISTRATOR
SMALL BUSINESS ADMINISTRATION
and
ROBERT E. HAMPTON, CHAIRMAN
U.S. CIVIL SERVICE COMMISSION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Beatrice Silk, pro se, respectfully petitions this Honorable Court for a writ of certiorari to review a judgment, appended as (Exhibit A) and opinion of the U.S. Court of Appeals for the First Circuit, appended as (Exhibit B), entered in this cause on January 6, 1971. Appended hereto as (Exhibit C) is copy of petitioner's September 9 motion to vacate district court's order of dismissal, denied on October 15, 1970, upon which petitioner's appeal to the Circuit Court of Appeals was taken. Circuit Court's opinion of January 6, 1971 contained nothing with reference to indispensable parties referred to in (Exhibit C). The District Court did not write an opinion. The petitioner also submits to this Court the complete record in this case from the courts below.

An order by the U.S. Court of Appeals denying a rehearing was entered on January 18, 1971, appended as (Exhibit D).

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. Sec. 1254(1) "U.S.C.1964 ed." page 49, which provides that "Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." June 25, 1948 c. 646, 62 Stat. 928.

By letter of February 10, 1971 to Justice William J. Brennan, Jr. of the United States Supreme Court, appellant requested extension of time in which to petition for certiorari; said request was granted by the U.S. Supreme Court in its letter of February 16, 1971, appended as (Exhibit E).

At a hearing in the District Court on April 8, 1970, the Court instructed plaintiff to amend her complaint by June 8, 1970 or her case would be dismissed. Plaintiff complied with the Court's order and her complaint, having same party defendants, was not dismissed at that time. Thereafter, on August 12, 1970 the amended complaint was dismissed by the District Court for not joining indispensable parties. Plaintiff filed a motion to vacate dismissal and this motion, appended as (Exhibit C), was denied on October 15, 1970 by the District Court without stating in writing the reasons therefor.

On November 12, 1970 pursuant to Rule 4(a) Federal Rules of Appellate Procedure, the plaintiff filed a timely notice of appeal from the District Court's order of October 15. In its opinion dated January 6, 1971, the Court of Appeals held that the plaintiff's notice of appeal filed on November 12 was timely and that the appeal could not be dismissed for want of jurisdiction.

The Court of Appeals then made a ruling that the plaintiff's motion to vacate which was filed in the District Court on September 9, 1970 was not timely and cited Rule 59(e) F.R.Civ.P. The District Court did not make a ruling that the September 9 motion was untimely filed. This matter was brought up for the first time in the Court of Appeals. The plaintiff believes that the U.S. Court of Appeals was in error in its statement

that the September 9 motion came under Rule 59(e). The plaintiff avers that Rule 59(e) applies to new trials and is not applicable to the instant case because the August 12 order of the District Court was not a "final judgment" and was subject to change, correction, or other appropriate action. Since no findings of fact and conclusions of law were made, there was no question of a new trial involved.

The plaintiff filed September 9 motion to vacate the order of the District Court dated August 12, 1970 pursuant to subsection (6) of Rule 60(b) F.R.Civ.P. which provides, "On motion and upon such terms as are just, the court may relieve a party from a final judgment or order for any reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time ...". Consequently, the plaintiff-appellant did comply with the rules concerning timeliness.

The petitioner has never received a ruling on the merits of her case, namely, the failure of the respondent to take corrective action recommended in accordance with the decision of the U.S. Civil Service Commission dated May 21, 1965 appended as (Exhibit F). At the bottom of page 5 of (Exhibit F), which comes under the heading of PART VI FINDINGS AND RECOMMENDATION, it provides that ... "We are led to the conclusion that either a situation existed calling for the application of the Civil Service Regulations governing reduction in force as set forth in Chapter 351, sub-Chapter 2-6, rather than a demotion for cause within the provisions of Part 752-B of the Civil Service Regulations, or that in the alternative, there were reasons of a personal nature for eliminating or excluding those grade and series controlling duties from Miss Silk's assignments, which were not included in the advance notice of proposed demotion. Either of these situations must cause the instant demotion to fail for want of application of appropriate procedural requirements to a proper personnel action to give effect to the classification determination made by this office under Title V of the Classification Act of 1949, as amended. The action of the Small Business Administration is accordingly not sustained. It is recommended that Miss Silk's demotion be cancelled retroactively as of the date on which it was effected, October 25, 1964."

The U.S. Civil Service Commission found that the demotion was without cause and, therefore, is in violation of procedural requirements of 5 U.S.C.A. Sec. 7512(a) "U.S.C.1964 ed." page 372, which provides that "An Agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service." Pub.L.89-554, Sept. 6, 1966, 80 Stat. 528.

The Boston office of the U.S. Civil Service Commission recommended that the demotion be cancelled retroactively as of the date on which it was effected October 25, 1964. This decision rendered on May 21, 1965 was pursuant to 5 U.S.C.A. Sec. 557 "U.S.C.1964 ed." pages 124 and 125 which provides that "The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof." Pub.L.89-554, Sept. 6, 1966, 80 Stat. 387.

The respondent violated 5 U.S.C.A. Sec. 7701 "U.S.C.1964 ed." page 402 which provides that "... The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends." Pub.L.89-554, Sept. 6, 1966, 80 Stat. 530. The administrative authority never took this corrective action.

The basis for federal jurisdiction in the court of the first instance is 5 U.S.C.A. Sec. 702 "U.S.C.1964 ed." page 173 which provides that, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Pub.L.89-554, Sept. 6, 1966, 80 Stat. 392.

Because the petitioner's case has not been allowed to go to the merits, it has caused petitioner to suffer loss of pay for six years, and prevented advancement in her position. The Writ should be allowed in order to resolve those questions that are delaying findings on the merits. Unless relief is granted to the petitioner, it would set a precedent whereby any federal agency could demote a federal career employee, without cause, even though the Regional Office of the U.S. Civil Service Commission found the demotion to be procedurally defective.

WHEREFORE, Beatrice Silk, petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit in the above-entitled case.

Respectfully submitted,

Beatrice Silk
Beatrice Silk, pro se

AFFIDAVIT OF SERVICE

I, Beatrice Silk, pro se, appellant-petitioner, hereby state that all parties required to be served with copies of the petition for writ of certiorari have been served.

Beatrice Silk
Beatrice Silk, pro se
14 Perkins Square
Boston, Mass. 02130

I, Beatrice Silk, pro se, appellant-petitioner herein, depose and say that on the 2nd day of April 1971, I served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on Thomas S. Kleppe, et al. appellees-respondents herein, by delivering the same to Wayne B. Hollingsworth, Asst. U.S.Attorney in the offices of U. S. Attorney Herbert F. Travers, Jr., counsel of record for said Thomas S. Kleppe, et al., located at 1107 Post Office and Courthouse Building, Boston, Massachusetts 02101.

Received by:
Helen M. Ferrigno
Administrative Assistant

Beatrice Silk
Beatrice Silk, pro se

Subscribed and sworn to before me, at Boston, Mass.
this 2nd day of April 1971.

Helen M. Ferrigno
Notary Public

My commission expires:
Aug. 27, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1550

BEATRICE SILK, PETITIONER

v.

THOMAS S. KLEPPE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Petitioner was employed by the Small Business Administration, initially in 1960 as a clerk, grade GS–5; she was promoted in 1962 to Placement and Classification Assistant, grade GS–7. In 1963, she appealed to the Civil Service Commission for an increase in grade. In April 1964, the Commission's Regional Office in Boston, Massachusetts, informed her by letter that, in view of the functions she performed, her position did not support her GS–7 grade and that it was therefore recommending a reclassification of her position by the SBA to Personnel Clerk, having the lower level of GS–5.

423–856—71

The SBA followed this recommendation and petitioner appealed. After a hearing by the SBA, the hearing examiner upheld the job reclassification. Petitioner appealed to the Boston Regional Office of the Civil Service Commission and was given another hearing (5 C.F.R. 752.203, 772.305). In May 1965, the Appeals Examiner held that the SBA action had been procedurally defective (Pet. Exh. F).[1] The SBA appealed that determination to the Commission's Board of Appeals and Review (5 C.F.R. 772.307), which in November 1965 reversed, upholding the SBA job reclassification. Petitioner's subsequent requests that the Board reconsider its decision and that the Commissioners reopen and review her case were denied.

Petitioner filed the present action in the United States District Court for the District of Massachusetts in 1969, naming as defendants the Administrator of the SBA and the Chairman of the Civil Service Commission. Defendants moved to dismiss the complaint on several grounds, including that petitioner had failed to join the individual Civil Service Commissioners, indispensable parties to the action.[2] During a hearing on the motion, the court advised petitioner to obtain an attorney and return in two months'

[1] The Examiner found that the SBA action was due either to a reduction in work-force or to personal reasons and therefore did not comply with the applicable procedural requirements—if the former, petitioner had not been changed to a position already in existence; if the latter, she had not been given advance notice by the SBA of those personal reasons (Pet. Exh. F, pp. 5–6).

[2] See *Blackmar* v. *Guerre*, 342 U.S. 512.

time. Thereafter, petitioner, acting *pro se,* on two occasions sought to amend her complaint in certain respects, but she declined to join the individual Commissioners; she then moved for summary judgment.

On July 8, 1970, the district court granted the defendants' earlier motion to dismiss. On petitioner's motion to vacate, however, the court reconsidered its dismissal order at a further hearing on July 16, 1970. On July 21, 1970, it affirmed the earlier dismissal. Petitioner filed a second motion to vacate the order, and, on August 12, 1970, the court vacated that order by entering a new one dismissing the complaint for failure to join indispensable parties. On September 9, 1970, petitioner moved to vacate the August 12 dismissal order (Pet. Exh. C), and this motion was denied on October 15, 1970.

Petitioner filed a notice of appeal on November 12, 1970; defendants moved to dismiss the appeal on the ground that petitioner's September 9 motion to vacate was untimely under Rule 59(e), Fed. R. Civ. P.[3] The court of appeals, declining to dismiss the appeal, affirmed the October 15 order of the district court (Pet. Exh. A and B). The court ruled that petitioner's September 9, 1970 motion to vacate had not been timely filed under Rue 59(e), Fed. R. Civ. P., and thus did not stay the running of the 30-day period within which to appeal the district court's order of August 12, 1970. Hence the November 12, 1970 notice of ap-

[3] Rule 59(e), F.R. Civ. P., provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

peal was filed out of time with respect to that order under Rule 4a, Fed. R. App. P. The court of appeals held that the notice of appeal was timely with respect to the subsequent October 15, 1970 district court order. But as to that order, the court ruled that the district court had properly denied petitioner's September 9 motion to vacate since it was filed out of time under Rule 59(e), Fed. R. Civ. P.[4]

A timely petition for rehearing was denied on January 18, 1971 (Pet. Exh. D).

2. The petition presents only a narrow procedural question as to timeliness which turns on the particular circumstances of this case. The courts below afforded petitioner every consideration, including liberal interpretations of procedural and jurisdictional requirements, in resolving the issue raised, and correctly decided the question. There is thus no cause for further review.

3. Moreover, aside from the timeliness question, petitioner is entitled to no relief on the merits of her claim. Contrary to her assertion (Pet. 4), the SBA was not required to take corrective action in accordance with the May 1965 determination of the Civil Service Commission Appeals Examiner (Pet. Exh. F).

---

[4] The court below (Pet. Exh. B) rejected petitioner's contention that her September 9 motion should be treated as a motion for relief from a final judgment or order by reason of "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1), F.R. Civ. P., which can be "made within a reasonable time." It concluded (Pet. Exh. B, p. 3) that petitioner's "motion is based on the broad ground that the court made an erroneous ruling," and therefore is not within the intended scope of Rule 60(b)(1), which is "addressed to some special situations justifying extraordinary relief."

The Commission's Board of Appeals and Review fully considered and reversed that determination, finding that the SBA job reclassification "was not unreasonable, arbitrary or capricious, and that it was for such cause as will promote the efficiency of the service."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

U. S. GOVERNMENT PRINTING OFFICE: 1971